No. 12299.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

PAUL GAWZNER and IRENE GAWZNER,

Appellants,

vs.

LEO LEBENBAUM,

Appellee.

LEO LEBENBAUM,

Appellant,

vs.

PAUL GAWZNER and IRENE GAWZNER,

Appellees.

OPENING BRIEF OF APPELLANT LEO LEBENBAUM.

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TOPICAL INDEX

PAGE

Opinion below 1

Jurisdiction 2

Statutes involved 3

Succinct statement of case 3

Extended statement 5

Questions presented 12

Summary of argument 14

Argument 22

I.

The trial court erred in not awarding Lebenbaum all of the rental awarded for the taking of the leased area 22

II.

The trial court erred in not finding and decreeing that the parties had abandoned the measure of damages fixed by the Fifth Amendment and had permanently fixed the sum of $113,704 then remaining in the registry as the agreed rental to be paid by the Government for the compensation, other than for restoration, for its taking of the leased and unleased areas 42

III.

The trial court erred in failing to separately find and decree the sum due appellants Gawzner for the Government's obligation to them for the rental of the unleased area 45

IV.

The court erred in denying Lebenbaum's motion to exclude appellants Gawzner from participation in the trial except as to the fixing of the value of the use and occupancy of the unleased area 46

PAGE

V.

The court erred in refusing to find and decree that its jurisdiction was limited to determining..... 49

VI.

The court erred in refusing to find and decree that it was without jurisdiction to try and determine the contract rights of appellants Gawzner, against appellant Lebenbaum, to collect rents under the lease during the plaintiff's occupancy of the leased premises, or to enforce payment thereof..... 49

VII.

If the court had jurisdiction to determine and enforce payment of the rental due from Lebenbaum to Gawzners under the lease, during the period of plaintiff's occupancy of the leased premises, it should have found and decreed that such rental was the minimum guarantee of $1500 per month as provided in paragraph three of the lease..... 55

VIII.

The court erred in overruling Lebenbaum's objections to, and denying his motions to strike the answers of the witnesses Allen and Frisbie as to the bonus value of Lebenbaum's leasehold estate..... 56

TABLE OF AUTHORITIES CITED

CASES	PAGE
Albrecht v. United States, 91 L. Ed. 532, 329 U. S. 599	9, 43, 51, 52
Bader v. Coale, 48 Cal. App. 2d 276, 119 P. 2d 763	26
California v. United States, 169 F. 2d 914	24
Cherokee Nation v. Southern Kans. R. R. Co., 135 U. S. 641, 34 L. Ed. 295	50
Conover v. Smith, 83 Cal. App. 227, 256 Pac. 835	31
Danforth v. United States, 308 U. S. 271, 84 L. Ed. 240	43
Duckett v. United States, 266 U. S. 148, 69 L. Ed. 216	34, 37
Eagle Lake Imp. Co. v. United States, 160 F. 2d 182	51
Erickson v. Rhee, 181 Cal. 562, 185 Pac. 847	38
Fargo v. Browning, 61 N. Y. Supp. 301	47
Gluck v. Baltimore, 81 Md. 315, 32 Atl. 515	34, 41
Gruber v. Pacific States Sav. & Loan Co., 13 Cal. 2d 144, 88 P. 2d 137	39
Hitchcock v. Hassett, 71 Cal. 331, 12 Pac. 228	39
John Hancock Mut. Life Ins. Co. v. United States, 155 F. 2d 977	41, 56
Keating v. Preston, 42 Cal. App. 2d 110, 108 P. 2d 479	24
Leonard v. Auto Car Sales & Service Co., 392 Ill. 182, 64 N. E. 2d 477	34, 36, 37, 40, 47
Lemm v. Stillwater Land & Cattle Co., 217 Cal. 474, 19 P. 2d 785	24
Lowe v. Ruhlman, 67 Cal. App. 2d 828, 155 P. 2d 671	24
Monongahela Nav. Co. v. United States, 148 U. S. 312, 37 L. Ed. 463	50
New York Telephone Co. v. United States, 136 F. 2d 87	48, 52
Pasadena v. Porter, 201 Cal. 381, 257 Pac. 526	34, 35, 41, 50, 51, 52, 55
Reidman v. Barkwill, 139 Cal. App. 564, 34 P. 2d 744	32

PAGE

San Joaquin, etc. v. Stevinson, 164 Cal. 221, 128 Pac. 924..... 48, 50, 51, 52
Stratford v. Continental Mtge. Co., 74 Cal. App. 551, 241 Pac. 429 ..... 24, 32
Swanson v. United States, 156 F. 2d 442..... 53
United States v. Alderson, 53 Fed. Supp. 528..... 27
United States v. Certain Land in Annapolis, Md., 46 Fed. Supp. 441 53
United States v. General Motors, 323 U. S. 373, 89 L. Ed. 311 ..... 37, 38, 56
United States v. Lands, 53 Fed. Supp. 884..... 9, 44, 51
United States v. Land in Mariposa County, Calif., 77 Fed. Supp. 798 44
United States v. Petty Motor Co., 327 U. S. 372, 90 L. Ed. 729 56
United States v. 21 Acres of Land, 61 Fed. Supp. 268..... 23, 35, 40
United States v. 150.29 Acres of Land, 148 F. 2d 33..... 25
Wachovia Bank v. United States, 98 F. 2d 609..... 43
Walther v. Sierra Ry. Co., 141 Cal. 288, 74 Pac. 840..... 35
Webb v. Jones, 88 Cal. App. 20, 263 Pac. 538..... 39

STATUTES

Act of August 18, 1890 (26 Stat. 315)..... 3
Act of August 18, 1890 (26 Stat. 316)..... 2
Act of July 2, 1917 (40 Stat. 241)..... 2
Act of April 11, 1918 (40 Stat. 518; 50 U. S. C., Sec. 171)..... 2
Act of March 27, 1942 (56 Stat. 176)..... 2
Civil Code, Sec. 1442..... 24
Civil Code, Sec. 1648..... 30
Civil Code, Sec. 3275..... 31
Military Appropriation Act (Act of June 28, 1944) (58 Stat. 573) 3

PAGE

Second War Powers Act (56 Stat. 176; 50 U. S. C., App., Sec. 632) 3
United States Code, Title 28, Sec. 1291 2
United States Code, Title 40, Sec. 258a 53
United States Constitution, Fifth Amendment 3, 9, 12, 21

TEXTBOOKS

32 American Jurisprudence, Sec. 76, pp. 89-90 35
32 American Jurisprudence, Sec. 195, p. 185 35
15 California Jurisprudence, Sec. 19, pp. 614-615 35
15 California Jurisprudence, Sec. 76, p. 667 35
15 California Jurisprudence, Sec. 137, p. 726 39
29 Corpus Juris Secundum, Sec. 198, p. 1106 ..... 39, 46
Macmillan's Modern Dictionary (1938 Ed.) 29
Webster's Encyclopedic Dictionary (1948 Ed.) 29

INDEX TO APPENDICES

PAGE

Appendix I 3
Excerpts from the Fifth Amendment to the Federal Constitution 1
Excerpts from the Act of August 18, 1890 (26 Stat. 315) as amended 1
Excerpts from the Second War Powers Act (56 Stat. 176; 50 U. S. C. Appendix, Sec. 632) 1
Appendix II. Excerpts from Streets and Highways Statutes 3
Appendix III. Excerpts from Reporter's Transcript 5

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OPENING BRIEF OF APPELLANT LEO LEBENBAUM.

Opinion Below.

There are three opinions by the District Court. The first was by the late Judge Harry A. Hollzer, dated June 30, 1945, in which he held, on pre-trial, that the taking of a portion of appellant, Lebenbaum's lease did not terminate the lease, or said appellant's right to compensation for such taking, under paragraph Ten of said lease. This opinion is reported in 61 Fed. Supp. 268. The second was by Judge Jacob Weinberger [R. 13] and is unreported. The third is likewise by Judge Weinberger [R. 105] and

is unreported. The findings of fact and conclusions of law appear in the record at pages 214-236.

Jurisdiction.

This suit was originally brought by the United States of America under the Act of Congress approved August 18, 1890 (26 Stat. 316) as amended by the Act of Congress approved July 2, 1917 (40 Stat. 241), as amended by the Act of Congress approved April 11, 1918 (40 Stat 518; 50 U. S. C., Sec. 171), as amended by the Act of Congress approved March 27, 1942 (56 Stat. 176), commonly known as the Second War Powers Act. Jurisdiction was thereby vested in the District Court to fix and determine what interests were taken, from whom they were taken, the amount of the just compensation to be paid for such taking and to whom such compensation should be paid.

For the reasons stated in the Argument, *infra,* pp. 49-55, it is believed that the District Court had *no* jurisdiction to *adjust equities* between appellant Lebenbaum and appellants Gawzner, or to determine their rights and liabilities *inter se under the lease* or to fix and award rent *under the lease* to Gawzners, where no portion of Gawzners' rights in such lease were taken by plaintiff and only Lebenbaum's rights were taken.

The judgment from which this appeal was taken was entered April 15, 1949 [R. 237]; appellant's Notice of Appeal was filed May 16, 1949 [May 15, 1949 being a Sunday; R. 247]. The jurisdiction of this Court is invoked under Title 28 U. S. C., Section 1291.

Statutes Involved.

The Act of August 18, 1890 (26 Stat. 315) as amended.

The Second War Powers Act (56 Stat. 176; 50 U. S. C. Appendix, Sec. 632).

The Military Appropriation Act. approved June 28, 1944 (58 Stat. 573).

The Fifth Amendment to the Federal Constitution.

Pertinent excerpts from each appear in *Appendix i.*

Succinct Statement of Case.

This is a succinct statement of the case without transcript reference. Transcript references are contained in the extended statement which follows:

The United States condemned the temporary occupancy and use of approximately 21 acres of land in Santa Barbara, California, the major portion of which was under a lease for hotel purposes from appellants Gawzner to appellant Lebenbaum, and a small portion of which was outside the leased area. The Government took a term of 22⅔ months, commencing on July 10, 1944 and ending July 1, 1946.

At the date of the taking Lebenbaum's lease ran until December 31, 1948, and he had an option for a 5-year renewal, so that, as to the leased area, the Government was a "short term occupier of a portion of a long term lease." Possession of both portions of the property was taken under the Second War Powers Act and *without* Court order. There was *no Declaration of Taking* but, with the consent of appellants, the Government made a number of deposits of estimated compensation into the registry of the Court. At the date when possession was

taken Lebenbaum was in possession of the leased area and Gawzners were in possession of the unleased areas.

The Government and all three appellants stipulated in writing, fixing the total obligation of the Government, for rent and for restoration, in the sum of $205,000 and pursuant thereto a judgment was entered for said sum and which provided that such sum was the just compensation to be paid by the Government and that if called and sworn, competent witnesses would so testify. The Government deposited the deficiency over and above its previous deposits and the appellants filed satisfactions as to it. Thereafter, and prior to the entry of the judgment which is here appealed from, all three appellants, by stipulation, fixed the amount of the compensation for restoration and repair in the sum of $91,296 and, pursuant to the stipulation, the Court caused said sum to be disbursed to them out of the sums in the registry. This left the sum of $113,704 as the *agreed compensation for rental* for the leased and unleased areas.

Gawzners claimed this *entire* sum upon the ground that the lease was terminated by this suit and their notice to Lebenbaum under paragraph Ten of the lease. Lebenbaum claimed *all* of this sum, *excepting* such amount as should be fixed and allowed as *rental* for the use and occupancy of the *unleased area* for such period of 22⅔ months. The Court rejected both claims, held that paragraph Ten of the lease did not apply to this suit and that the lease *remained effective for all purposes,* but further held that it had jurisdiction *to do equity as between the parties* and that equity would require a consideration of what each party might have obtained under the lease had the Government not condemned temporary occupancy of it. He, therefore, proceeded to hear evidence as to the market rental value of the unleased area and as to what

the parties might have obtained by way of income under the lease if the Government had not seized a portion thereof and, upon such basis, refused to separately fix and determine the portion of the award which represented rental to Gawzners for the use and occupancy of the unleased area and allocated the remaining funds in the registry on a basis of approximately 52% to Gawzners and 48% to Lebenbaum. All defendants have appealed.

Extended Statement.

This case originated as an eminent domain taking under the Second War Powers Act of an estate in certain real and personal property located in the City of Santa Barbara, California, for a term of years beginning July 10, 1944 and ending June 30, 1945, and extendable for yearly periods thereafter, during the existing national emergency, at the Government's election. The property taken consisted of lands and improvements owned in fee by appellants Gawzners, the major portion of which was improved and being operated as a hotel known as the "Mirmar Hotel." This major portion had been leased in writing [R. 275] by appellants Gawzner to appellant Lebenbaum for a term of years beginning December 15, 1943, and ending December 31, 1948. Possession was taken of this portion of the premises without Court order under the authorization contained in the Second War Powers Act [R. 261] and from appellant, Lebenbaum, who was then in actual possession thereof under said lease [R. 5, 15] and was then actively engaged in managing and operating the hotel after having advanced and expended some $20,000 to rehabilitate, redecorate and refurnish the premises [F. 12; R. 226]. This will hereafter be called the *leased area.*

The portions taken which were not included in the Lebenbaum lease were taken without Court order from appellants Gawzners. Both Gawzner and his wife and Lebenbaum were named in the original complaint and all subsequent amendments, as apparent owners of, or claimants to, some interest in the property taken [F. 2; R. 216]. This will hereafter be called the *unleased area.*

The Gawzners filed an answer to the complaint alleging sole ownership, admitting that Lebenbaum *had* a lease covering the leased area but alleging that under paragraph Ten of the lease [R. 291] and pursuant to a 30-day written notice served by them upon Lebenbaum [R. 305], such leasehold rights had terminated and claiming the *total compensation* for the taking [R. 72].

Lebenbaum filed an answer to the complaint, alleging the existence of the lease from the Gawzners, that the lease was in effect and he, Lebenbaum, was in possession at the date the Government took possession of the leased premises, that the lease had not been terminated and that he, alone, was entitled to the *full compensation* for the taking of the leased area [R. 87; 263, par. 12].

While the record was in such stage, the Government elected to extend its term to June 30, 1946 [R. 262, par. 6].

A pre-trial hearing was had before the late District Judge Harry A. Hollzer, as to the issue thus presented and he rendered a decision which is reported in 61 Fed. Supp. 268. He held that paragraph Ten of the lease was not intended to apply to this type of condemnation proceeding and that the lease remained in effect with Lebenbaum bound to the Gawzners as if no taking had occurred and that the compensation for the leased area was payable to Lebenbaum [R. 114].

Shortly thereafter Judge Hollzer died, the Government amended its Complaint and the cause was transferred to Judge Weinberger. In pleadings to the amended complaint the appellants Gawzners and appellant Lebenbaum raised the same issues, each claiming *all* of the compensation for the leased area and Lebenbaum filed a motion to exclude the Gawzners from participation in the fixing of compensation for such area [R. 6] and a motion that the Government be directed to return possession thereof to him [R. 4]. The Gawzners opposed both motions [R. 9, 262]. This resulted in a new pre-trial hearing and Judge Weinberger filed a written memo of his conclusions on April 30, 1946 [R. 13]. He agreed with Judge Hollzer that the lease had not been terminated but remained in full force and effect [R. 16]. He then ordered the premises covered by the lease returned by the United States to the possession of Lebenbaum [R. 16] and denied the Lebenbaum motion to exclude the Gawzners [R. 17].

The United States entered into a separate stipulation with Lebenbaum as to surrender of possession of the portion taken covered by this lease [R. 20] and he accepted and receipted for possession on June 17, 1946 [R. 28]. The Government entered into a separate stipulation with the Gawzners as to redelivery of possession of the portion taken which was not in the Lebenbaum lease [R. 23] and they receipted for possession thereof on July 10, 1946 [R. 35].

On October 23, 1946, the Government filed its Third Amended Complaint which fixed the total term of its taking as commencing on July 10, 1944 and ending June 1, 1946 [R. 36]. Lebenbaum had filed an answer to the Government's Second Amended Complaint on November 6, 1945 [R. 87] and it was stipulated that it would serve

as answer to the Third Amended Complaint [R. 263, par. 12].

The Gawzners filed an answer to the Third Amended Complaint [R. 72].

During the course of the proceedings and upon its application and the stipulation of appellants Gawzners and Lebenbaum, the United States had made three deposits into the registry of the Court totaling $73,693.55 [R. 264].

On April 18, 1945, the sum of $1,594.02 was paid to the Gawzners (for taxes) to be credited upon any award received by them [R. 264].

On November 26, 1946, the Government and all of the appellants stipulated as to the compensation to be paid by the Government [R. 45] and a judgment was entered pursuant thereto [R. 53]. Following this the Government paid the balance of the adjudged compensation into Court [R. 265] and thereby became eliminated from this cause [R. 410].

Said stipulation [R. 45] and judgment [R. 53] each provided:

> (b) That the sum of $205,000, without interest, except as hereinafter provided, is the fair, just, and adequate compensation to be paid by plaintiff in full settlement and satisfaction of its obligation for the taking of such interest or estate as set forth in subparagraph (a) above, together with all compensation to be paid as damages arising out of any failure or default upon the part of plaintiff in performance of its obligation to restore such premises and real and

> personal property so taken by it to the same condition as it was when it was received by the plaintiff from the defendants, reasonable and ordinary wear and tear excepted, including compensation for the time estimated to be required for the completion of such restoration;

It is the contention of appellant Lebenbaum that the parties (Lebenbaum and Gawzners) thereby departed from the rule of just compensation fixed by the Fifth Amendment and fixed the compensation by contract; that they are bound thereby and the measure of the Fifth Amendment no longer governs this case. (*Albrecht v. U. S.,* 91 L. Ed. 532, *538,* 329 U. S. 599, *603; United States v. Lands,* 53 Fed. Supp. 884, *885.*)

Following further arguments and a partial trial, appellants Lebenbaum and Gawzners entered into a stipulation [R. 98] fixing the amount of the agreed award to be allotted to each of them as the portion of the award covering restoration damages and payment was ordered and made in accordance therewith [R. 103].

It is the contention of appellant Lebenbaum that the moneys remaining in the registry represented the rental for unleased area and for the leased area. That having held that the lease remained in full force and effect and that he, Lebenbaum, continued liable to the Gawzners for rent under his lease, the trial court was required to fix as an award to the Gawzners that portion of the agreed rent for the unleased area and to award the balance in the registry to Lebenbaum as the agreed rental for the leased area. That the trial court had no general, equitable or legal jurisdiction which was invoked by these proceedings, to adjudge and enforce payment of rental to Gawzners by Lebenbaum *under the lease,* or to disburse such contract

rental out of that portion of the fund remaining in the registry which represented the agreed rental value of the leased area and that this was particularly true where Gawzners had no interest in or lien upon such agreed rental for the leased area and they had continuously refused to accept or receive rent from him [R. 226]. Appellant Lebenbaum also contends that, if the trial court did have jurisdiction to adjudge and enforce payment of rental from Lebenbaum to Gawzners (under the lease) and out of the fund on deposit, paragraph Three of the lease required the Court to fix the rental in the guaranteed minimum of $1500 per month.

The trial court overruled these contentions of appellant Lebenbaum and held that, since both parties had appeared and invoked its jurisdiction by claiming to be entitled to the compensation, it could retain and that it had retained, jurisdiction to adjust and enforce the equities and legal rights of the parties under the lease and it proceeded to do so.

In the ensuing trial testimony was offered by Gawzners through witnesses Allen and Frisbie that the *leased* portion had no bonus value [R. 377, 393] and the motion of appellant Lebenbaum to strike such testimony was denied [R. 187]. Appellant Lebenbaum contends that such evidence was incompetent, irrelevant and immaterial and that the refusal to strike it was prejudicial error because the parties *by their agreement,* had fixed the compensation and no other measures could thereafter be applied by the Court.

Because the trial court had ruled against his contention that the agreement controlled, appellant Lebenbaum introduced evidence as to the actual and expected income from the operation of the leased property [R. 425-448] and the

Court adduced evidence from the witness Frisbie that the market rental value of 22⅔ months' use and occupancy of the leased area was $161,500 [R. 400]. The witness Allen [R. 382] and the witness Frisbie [R. 395] each testified that the market rental value of the lands not included in Lebenbaum's lease, for the term taken, was $10,950.*

By stipulation appellants had fixed the total compensation, including restoration and rental, at $205,000 [R. 45, 53] and had agreed upon $91,296 as restoration [R. 98, 103], leaving $113,704 to be distributed as rent. Thus, the evidence had disclosed that the market rental value of the leased and unleased areas, together with the stipulated restoration, amounted to the total of $161,500 plus $10,950, plus $91,296, or a total of $263,746, whereas the agreed compensation paid by the Government was $205,000, or approximately 77.7% of the market rental value and restoration damage.

The trial court, therefore, apparently scaled down the $10,950 to 77.7% thereof or $8,508 which, when deducted, left $105,196 as the ratably reduced rent for the leased area. He next determined from the testimony of witness Pettegrew [R. 175] that the distribution of prospective earnings would have been 52% to the owners (Gawzners) and 48% to the tenant (Lebenbaum) and, assuming he had jurisdiction to do so, divided the remainder of $105,196 in approximate percentages of 58% to the owner and

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*The trial court found that such amount was $10,500. This was based on testimony of Allen. However, Frisbie subsequently testified that an error had been made in the area of the unleased portion and, after correcting the area, testified that the market rental value thereof was $10,950. It was then stipulated that Allen's testimony should be corrected to the same amount. However, the trial court failed to note the stipulation in arriving at his finding [R. 162, fols. 23 and 24; R. 232].

42% to the lessee, to-wit Gawzners $60,836, Lebenbaum $44,360.

It is not clear just how he arrived at these percentages unless, by inadvertence, he transposed the percentage figures.

Lebenbaum asserts that the trial court had no jurisdiction to fix the rent to be paid by Lebenbaum to Gawzners *under the lease* nor to order it paid from this compensation. That such equitable or legal adjustments and decrees as to the rights of the appellants *inter se* and not connected with any interest in the award paid by the Government were exclusively within the jurisdiction of the State Court and beyond the jurisdiction of the trial court, since all appellants were California citizens [R. 276].

Questions Presented.

The questions presented on this appeal are contained in Lebenbaum's Statement of Points which are set forth in the printed transcript [R. 273-275]. Appellant will herewith restate them succinctly:

1. Did the trial court err in failing to award appellant Lebenbaum all of the agreed rental for the taking of the leased area?
2. Did the trial court err in failing to find that the appellants, by contracts (*i. e.,* stipulations) waived the measure of compensation fixed by the Fifth Amendment and substituted $113,704 as their agreed rent for the taking of the use and occupancy of the leased and unleased areas?
3. Did the trial court err in failing to fix and decree the rental separately due Gawzners for the taking of the use and occupancy of the unleased area?

4. Did the trial court err in denying Lebenbaum's Motion to exclude appellants Gawzner from participating in the fixing of the compensation for the leased area?

5. Did the trial court err in refusing to limit the trial and its judgment to the fixing of the compensation for the taking of the use and occupancy of the leased and unleased areas separately, the determination of the persons entitled to such awards and the making of such awards?

6. Did the trial court err in assuming to itself jurisdiction to determine the rights and liabilities as between the appellants under the lease and ordering payment of the equivalent of rental under the lease out of the agreed award for the use and occupancy of a portion of the term of the lease?

7. If the Court had jurisdiction to determine and enforce payment of the rental due from Lebenbaum to Gawzners *under the lease* for the period of the plaintiff's occupancy of the leased premises, did the Court err in not finding and decreeing that such rental was the minimum guarantee of $1500 per month as provided in paragraph Three of the lease?

8. Did the Court err in overruling Lebenbaum's objection to, and refusing his motion to strike the answer of the witness Edward H. Allen as to the bonus value of Lebenbaum's lease?

9. Did the Court err in overruling Lebenbaum's objection to, and refusing his motion to strike the answer of the witness Charles G. Frisbie as to the bonus value of Lebenbaum's lease?

SUMMARY OF ARGUMENT.

1. The Trial Court Erred in Not Awarding Lebenbaum All of the Rental Awarded for the Taking of the Leased Area.

This is a more succinct repetition of Point 1 in his statement [R. 273]. The Lebenbaum lease was not terminated by this condemnation proceeding, nor by the Notice dated August 4, 1944. And the Court erred in not awarding Lebenbaum all of the agreed rental for the leased area. The trial court concluded that the lease was not terminated [C. 2; R. 234-235]. The Judgment appealed from [R. 238] so determined by implication by failing to award the *whole* compensation to the Gawzners.

Such portion of the Judgment is favorable to appellant, Lebenbaum, and, as we shall show, is correct upon the facts disclosed by the record and is supported by the applicable law. Lebenbaum *does not* appeal therefrom but asks affirmance by this Court.

Lebenbaum's claim of error is that the trial court did not *follow through* and award the total compensation for the rental of the leased area to him because:

(a) He, alone, is the one from whom possession was taken;

(b) Gawzners had no right to possession and none could be taken from them;

(c) They had no right in or lien upon such portion of the Government's obligation arising out of such taking, and

(d) The fund then remaining in the registry of the Court was the agreed monetary value of the Government's such obligation for rental.

2. **The Trial Court Erred in Not Finding and Decreeing That the Parties Had Abandoned the Measure of Damages Fixed by the Fifth Amendment and Had Permanently Fixed the Sum of $113,704 Then Remaining in the Registry as the Agreed Rental to Be Paid by the Government for the Compensation, Other Than for Restoration, for Its Taking of the Leased and Unleased Areas.**

This is a restatement of Lebenbaum's Point 3 [R. 274]. By Stipulation [R. 45] approved by the Court and incorporated into a Judgment [R. 53], the appellants agreed that all compensation to be paid by the Government was the sum of $205,000, plus certain improvements which the Government had made and would relinquish to the fee owners; that such sum and relinquished property was "fair, just and adequate compensation" [R. 47, 55] for the Government's obligation for *rent* and for *restoration* and that such would be the testimony of competent witnesses [R. 49]. Such stipulation and judgment covered both the leased and unleased areas and did not segregate the award as between them.

By subsequent stipulation [R. 98] approved by the trial court and incorporated into an Order [R. 103], the *restoration* portion of the Government's obligation was fixed at $91,296 and such sum was distributed between the appellants in accordance with their stipulation and there was left in the registry, at the date of the judgment appealed from, the sum of $113,704 [F. 21; R. 231].

Appellant, Lebenbaum, contends:

(a) The parties had the right to fix compensation by agreement;

(b) When so fixed it became binding in lieu of and supplanted the measure fixed by the Fifth Amendment;

(c) Rental and restoration constituted the full liability of the Government, and

(d) When restoration was fixed and paid by agreement, the remaining sum of $113,704 represented *agreed rental* for the leased and unleased areas.

3. The Trial Court Erred in Failing to Separately Find and Decree the Sum Due Appellants Gawzner for the Government's Obligation to Them for the Rental of the Unleased Area.

This is a restatement of Lebenbaum's Point 2 [R. 273-274]. The Government took a 22⅔ months' use and occupancy of two portions of improved and unimproved lands. That which we have called and will term the "leased area" was owned in part by Gawzners and in part by Lebenbaum. Lebenbaum had the exclusive right of possession as a lessee in possession for a term *beyond the term taken by the Government*—an estate known as a leasehold estate. It, and all rights and obligations *inter se* as fixed by the contract, remained in full force and effect. Lebenbaum's right of possession and use was taken. Gawzners had the reversion and the right to collect the contract rental from Lebenbaum, neither of which was taken. They had no right to the occupancy or use of the leased area which was all that was taken and they had no lien upon the award to secure their rental.

Lebenbaum, therefore, was the one whose interest was taken and was entitled to receive all of the rental which the Government was obligated to pay for the use and occupancy of his leasehold and Gawzners were entitled to receive only the rental which the Government was obligated to pay for the use and occupancy of the unleased area.

The $113,704 remaining in the registry and which the Court was called upon to distribute by the decree which has been appealed from, represented *both* rents and it became necessary for the Court to *fix* both. This the Court failed to do and instead assumed a purported jurisdiction in equity and further purported to fix the rights and obligations as between appellants under the contract provisions of the lease and to make equitable distribution accordingly.

4. The Court Erred in Denying Lebenbaum's Motion to Exclude Appellants Gawzner From Participation in the Trial Except as to the Fixing of the Value of the Use and Occupancy of the Unleased Area [R. 6, 16; 262, par. 9].

This is a restatement of Lebenbaum's Point 4 [R. 274]. The Court determined that the lease was still effective [R. 16]. This, by operation of law, eliminated any right of Gawzners in the compensation for the use and occupancy of the leased area. The Court should have restricted Gawzners' participation to the fixing of the compensation to be paid by the Government for the unleased area.

5. **The Court Erred in Refusing to Find and Decree That Its Jurisdiction Was Limited to Determining—**

   (a) what interests the plaintiff had taken;

   (b) from whom they were taken;

   (c) what the appellants had fixed and agreed to be the compensation for such taking, after they had deducted and received their fixed and agreed compensation for restoration;

   (d) who was entitled to such compensation [R. 274].

6. **The Court Erred in Refusing to Find and Decree That It Was Without Jurisdiction to Try and Determine the Contract Rights of Appellants Gawzner, Against Appellants Lebenbaum, to Collect Rents Under the Lease During the Plaintiff's Occupancy of the Leased Premises, or to Enforce Payment Thereof** [R. 274].

We state Lebenbaum's Points 5 and 6 together because they may properly be considered together as variants of the same error. This error was raised repeatedly and continuously by Lebenbaum:

(a) by motions to exclude Gawzners from participating in the trial in so far as the leased area was concerned [R. 114, 119, 123, 148], and

(b) by objections to the proceedings when the Court insisted upon evidence to support a basis for adjusting the cause "equitably" and allocated to each, *i. e.*, Gawzners and Lebenbaum, what he determined each might have derived *from operations under the lease* had the Government not condemned it [R. 149, 184-185 and Appendix ii].

We believe the error of the Court is demonstrated by the following established principles:

(a) This is a special proceeding in the nature of an action at law;

(b) It is not an equity case;

(c) It is not a proceeding *in personam;*

(d) But is a proceeding *in rem;*

(e) The fund remaining on deposit represented the rental for the rights taken and was *all* that was left for distribution and the full measure of the Court's jurisdiction;

(f) This was the agreed rental value in lieu of the constitutional market rental value;

(g) The only jurisdiction which had been invoked was under the eminent domain statute;

(h) The appellants (defendants) and the trial court were limited as to the remedies and jurisdiction, to the remedies which the appellants had against the Government as condemnor, and

(i) There was no federal jurisdiction here invoked and available to the Court and the appellants as to the matters not affecting appellants' rights against the Government as condemnor such as controversies *in personam inter se* because there was no diversity of citizenship.

7. If the Court Had Jurisdiction to Determine and Enforce Payment of the Rental Due From Lebenbaum to Gawzners Under the Lease, During the Period of Plaintiff's Occupancy of the Leased Premises, It Should Have Found and Decreed That Such Rental Was the Minimum Guarantee of $1500 Per Month as Provided in Paragraph Three of the Lease [R. 275].

Assuming, solely for the purpose of this Point, that the trial court had jurisdiction to fix the rental *under the lease* which Gawzners would have received during the Government's 22⅔ months' occupancy of the leased area and to direct that such sum be distributed from the remaining deposit in the registry, the lease, itself, fixed an *alternative* rental which the Court should have applied. Paragraph Three [R. 281-285] makes specific provision for the possibility that the lessors' contract percentage of the lessee's earnings *from operations* might be *less* than the guaranteed rent of $1500 per month [R. 282-283]. There is no provision therein for default or eviction should the lessee fail to earn enough to produce a lessors' contract percentage in excess of the minimum rental. Certainly there was none where such result is involuntary on the part of the lessee. Clearly, then, the alternative *guaranteed* rental of $1500 per month would be the maximum which the Court could have legally applied.

8. **The Court Erred in Overruling Lebenbaum's Objections to and Denying His Motions to Strike the Answers of the Witnesses Allen and Frisbie as to the Bonus Value of Lebenbaum's Leasehold Estate.**

This is a restatement of Lebenbaum's Points 8 and 9. We state them together because they cover the same error.

In view of the fact that the appellants, by stipulation, had fixed the compensation in an agreed amount as the agreed award for rental of the leased and unleased areas, the question as to what might or might not have been the bonus value measure under the Fifth Amendment, was irrelevant. Also, the bonus value rule only applies where the entire leasehold is taken and the lease is thereby terminated.

ARGUMENT.

I.

The Trial Court Erred in Not Awarding Lebenbaum All of the Rental Awarded for the Taking of the Leased Area.

1. The Lebenbaum lease was not terminated by this condemnation proceeding nor by the notice of termination dated August 4, 1944 [R. 305].

The trial court concluded that the lease was not terminated [C. 2; R. 234-235]. The judgment appealed from [R. 238] so determined by implication, by failing to award the *whole* compensation to the Gawzners. As we have stated, *supra,* page 14, such portion of the judgment is favorable to appellant Lebenbaum, and is correct upon the facts disclosed by the record and is supported by applicable law.

The notice to terminate, and the contentions of Gawzners that the lease was terminated, are predicated upon paragraph Ten of the lease [R. 291]. Said paragraph Ten discloses:

> (a) That the lease was entered into with knowledge that the *State of California* has acquired a strip of land for highway purposes which it was temporarily permitting the lessors to use for hotel purposes and which Lebenbaum was to be temporarily allowed to use;
>
> (b) That the parties contemplated that an *additional* portion of the premises to be leased to Lebenbaum might be condemned by the state or the county of Santa Barbara or any other *public body* for highway *or other public purpose;*

(c) That the parties contemplated that such condemnation proceeding would be one in which there would be an award which should belong to the lessor and an obligation in the nature of an assessment levied against the lessors' land which assessment should be assumed by the lessor, and

(d) That the parties contemplated a *permanent taking* of a portion of the *fee* and the consequent *permanent relocation* of existing buildings at the *expense of the lessors.*

In passing it should be noted that the Notice of Termination [R. 305] discloses that the lessors are not contending that the lessee was in default or that he had violated any term, provision or covenant of the lease. It should also be noted that the Court found that Lebenbaum had performed his obligations under the lease [F. 12; R. 226] and that, since the date of the Government's taking, Gawzners have refused to accept rent [F. 13; R. 226]. Without searching the record, this finding seems conceded by Gawzners in paragraph V of *their* proposed Findings [R. 202].

At the outset it should be recognized that if there were no paragraph in the lease relating to the situation that might arise by reason of a taking of the property in a condemnation, then the law would give the tenant an award for his leasehold interest. (*United States v. 21 Acres of Land,* 61 Fed. Supp. 268, 272. Thus, it appears that a condemnation provision is in *derogation* of the tenant's right to an award and is in the nature of a *forfeiture.* Hence, Gawzners must rely upon paragraph Ten as a *forfeiture.*

This lease to Lebenbaum is to be construed according to California law. (*California v. United States,* 169 F. 2d 914, 917.) Under such law forfeitures will be enforced if clear and unambiguous, but only if there is no other valid alternative under the language of the instrument. (*Lowe v. Ruhlman,* 67 Cal. App. 2d 828, 832, 155 P. 2d 671, 673.) Conditions involving a forfeiture of a lease must be strictly construed against the party in whose behalf they are invoked. (*Keating v. Preston,* 42 Cal. App. 2d 110, 117, 108 P. 2d 479, 483; Section 1442, California Civil Code.)

In California a contract is to be construed so as to produce equitable, as distinct from inequitable, results if the language used will admit of either construction, and a forfeiture of *an estate* will not be enforced except when the terms of the conditions are so plain as to be beyond the province of construction. (*Startford Co. v. Continental Mtge. Co.,* 74 Cal. App. 551, 555, 241 Pac. 429, 431.) Furthermore, the lease, as a whole, is to be considered and construed in order to interpret paragraph Ten if paragraph Ten is susceptible of several interpretations producing different meanings and results. (*Lemm v. Stillwater Land & Cattle Co.,* 217 Cal. 474, 480, 19 P. 2d 785, 788.) Applying these principles of law, and returning to the facts, we find that paragraph Ten refers to a highway taking by the State and a possibility that an *additional portion* of the leased premises may be condemned by the State, the County or *any other public body.* Does that mean any other public body of *any kind* (such as the United States), or does it mean any other public body *of the State* which is similar in character to the County of Santa Barbara, *i. e.,* a lesser body politic of the State of California?

Gawzners contended in the Court below, and will undoubtedly contend here, for the first construction. We contended successfully there and reaffirm here that the latter is a permitted construction, is the more equitable and is, in fact, required by reason of the following:

a) This lease shows on its face that it was carefully and deliberately drawn by competent and experienced counsel. Under such circumstances it is extremely unlikely that if its was intended to include the United States by using the designation "or other public body," the scrivener would have named the United States *last* in the order of priority for it is well established that the usual procedure and form followed by competent and experienced counsel is to name public authorities in the order of their superiority.

"It is unlikely that in drafting a lease the parties would, if they intended to include the United States, place it at the end of a list * * *."

United States v. 150.29 Acres of Land, 148 F. 2d 33, 35 (7th Cir.).

b) The very scrivener who prepared this lease used the *usual* order of priority and designated the United States by name and first in point of position where it was intended that the lease applied to the United States.

"or for any purpose or use in violation of the laws of the United States or of the State of California or of * * * the County of Santa Barbara." [Par. Fourteen, R. 295.]

It is difficult to explain the *failure to name* the United States in paragraph Ten in a paragraph laying the foundation for a right of forfeiture and at the same time expressly naming it in its proper order in paragraph Fourteen which, with paragraph Twenty-two [R. 299], laid other grounds for forfeiture, if the scrivener and the parties *intended* that the United States was to be included by the term "any other public body" as a possible condemnor in paragraph Ten.

c) The doctrine of *ejusdem generis:*

"The law, therefore, must adopt a formula to meet such situations and this formula, known as an aid to interpretation is the doctrine of *ejusdem generis,* which means that when general words follow specific words the former will be strictly limited in meaning to things of like kind and nature."

Bader v. Coale, 48 Cal. App. 2d 276, 279, 119 P. 2d 763, 765.

d) The reference to the fact that the condemor (referred to as "any other public body") might condemn additional portions of the leased premises "for highway purposes." While other public bodies of the State of California within the County of Santa Barbara (the City of Santa Barbara, the County of Santa Barbara, Santa Barbara Flood Control District, etc.) could lawfully exercise the State's power of eminent domain for acquiring lands for *highway purposes* (*cf.* App. ii), the United States may not engage in such actiivty.

"It is not a function of the National Government to build or maintain or improve the road system of

the various states. That is a responsibility of the state governments, and not of the National Government."

United States v. Alderson, 53 Fed. Supp. 528, 530.

e) The reference to payments of "*assessments levied in such* eminent domain proceedings" [R. 291]. The important words are those which have been emphasized. There are *State* eminent domain proceedings which may be exercised by it and by *its lesser* "other public bodies" in which assessments are levied upon the benefited lands (*cf.* App. ii), but there was not at the date of this lease, and there is not now, any eminent domain proceeding *available to the United States* in which *assessments* may be levied. Clearly, it would require a tortured and tenuous construction to interpret the words "or other public body" to *include the United States* as a contemplated condemnor in paragraph Ten of this lease.

Again, paragraph Ten refers to a condemnation acquisition "for highway or *other public purpose*" [R. 291]. Does the term "other public purpose" include this temporary war taking of a portion of the Lebenbaum lease by the United States or does the language which immediately follows the words "highway or other public purpose," to-wit:

"the amount of the award *in any such* condemnation suit shall belong solely to the lessors, but lessors shall pay any and all assessments levied *in any such* condemnation proceeding,"

necessarily import that the scrivener and the parties meant such highway or other (similar) public purpose which would be the subject matter of an eminent domain pro-

ceeding under State law *in which there would be an award and an assessment?* Gawzners contended in the Court below for the former interpretation; we, successfully, for the latter and we renew such contention here. We submit that it is impossible to give effect to the repetition of the words "in any such condemnation proceeding" without construing the entire sentence to refer to and to be limited by the entire paragraph and to refer to a condemnation proceeding under state law in which *assessments are levied as a part of the proceedings.* Such a proceeding is, as we have shown, exclusively limited to the State of California and its lesser public bodies (*cf.* App. ii). There is no such procedure in Federal eminent domain.

Gawzners stressed in the lower court and may urge here, that paragraph Ten *assigns* the award, in this case for the taking of a temporary use and occupancy of a portion of Lebenbaum's lease to them. They rely upon that portion of said paragraph which reads that:

> "The amount of the award *in any such condemnation suit* shall belong solely to the lessors."

We successfully urged below and reiterate here, that such words were used by a skillful and experienced scrivener, learned in the law, who was using precise grammar and punctuation and that it is but a portion of one sentence in one integrated paragraph. With such a background it is clear that such assignment of the award is limited to the assignment of an award in a condemnation suit for highway or other (similar) public purpose *under State law in which there is an award and a levy of an assessment* upon the property benefited by the improvement for which the condemnation is prosecuted and that it does not refer to and include an award in a proceeding such as this.

Such phrase is contained in one compact sentence, separated by commas:

> "In the event the State of California or the County of Santa Barbara or any other public body shall, by condemnation, acquire any additional portion of said leased premises for highway or other public purpose, the amount of the award in any *such* condemnation suit shall belong solely to the lessors, but lessors shall pay any and all assessments levied in any *such* condemnation proceeding." (Emphasis supplied.)

> "Commas are punctuation marks used to indicate slight breaks in the continuity of ideas or construction."

> Macmillan's Modern Dictionary, 1938 Ed.

> "Commas separate a sentence into divisions according to construction."

> Webster's Encyclopedic Dictionary, 1948.

We again refer to the repeated use of the words "any *such* condemnation proceeding." The use of "such" implies "of that kind which has been indicated." (Macmillan's Modern Dictionary, 1938 Ed.) It also implies "the same as has been mentioned." (Webster's Encyclopedic Dictionary, 1948.) Thus it is made clear that the entire paragraph refers to a State condemnation proceeding and not to a Federal condemnation suit, such as this, because in the latter suit there can be no assessment against the lessor's property.

Gawzner's stressed in the lower court and may contend here, that the last sentence of paragraph Ten [R. 292] gave them the right to terminate Lebenbaum's lease because the Government's occupancy included more than 50% of the rentable rooms and precluded Lebenbaum's

use of the beach during such occupancy. Here, again, they overlooked the precise language which is used and the clear and unmistakable connection of each subsequent sentence to the one preceding it. The sentence referred to reads:

> "*Further in this connection,* should the effect of *such condemnation* be such as to reduce the rentable rooms in said hotel by fifty (50) per cent or to preclude the subsequent use of the beach forming part of the leased premises, then either party to this lease may terminate the same on thirty (30) days' written notice to the other." (Emphasis supplied.)

The italicized words furnish the key to proper construction. The words "further in this connection" disclose that this sentence is related to, and is an additional provision in respect to, something that has been previously referred to and described. The words "such condemnation," as we have shown, imply the kind which has been previously indicated or of the same nature as that previously mentioned. Having that in mind and referring to the portions of the paragraph which immediately preceded the quoted portion, we find again that the provisions are all limited to a condemnation proceeding under State law in which assessments are levied against the lands benefited which, of course, *excludes* this proceeding.

Under California Civil Code, Section 1648, it is provided:

> "However broad may be the terms of a contract, it extends only to those things concerning which it appears the parties intended to contract,"

and in *Conover v. Smith,* 83 Cal. App. 227, 234, 256 Pac. 835, 838, the Court says:

> "When general and specific provisions of a contract deal with the same subject matter, the specific provisions, if inconsistent with the general provisions, are of controlling force."

To save time and to shorten this brief, we refer to Judge Hollzer's opinion in 61 Fed. Supp. 268, 270, to point out inequities which would result from a construction in favor of forfeiture if paragraph Ten were construed as contended for by Gawzners.

> "* * * The contentions advanced on behalf of the owners would lead to the inequitable result that the demised premises would be returned to the latter prior to the expiration of the original term of the lease, and all of the tenant's rights would be forfeited to the landlord, although the lessee had committed no default, and although no other event had occurred which, under the provisions of the lease, entitled lessors to recover possession of the premises. * * * The rights thus forfeited would include the tenant's exclusive privilege to the possession and use of said premises and of all improvements thereon, including the improvements paid for by him, and also his right to have refunded to him any unexpended balance of the aforementioned deposit."

Even if paragraph Ten warranted a forfeiteure, it would be of a kind governed by Section 3275, California Civil Code. Here, Gawzners sustained and could sustain no loss. Lebenbaum was and is completely liable on the lease and Gawzners may proceed, in a State Court of competent jurisdiction, to establish and recover the full unpaid rent, providing only, that they vacate or rescind

their anticipated breach and admit the continued existence of the lease. *It is only because of their refusal to accept rent that they have not heretofore been paid* [F. 13; R. 226].

We believe that it is also proper to note that the burden of proof of a forfeiture is on the person claiming such right (*Stratford v. Continental Mtge. Co.,* 74 Cal. App. 551, 555, 241 Pac. 429, 430; *Reidman v. Barkwill,* 139 Cal. App. 564, 567, 34 P. 2d 744, 746), and the record here discloses that the Gawzners offered no proof whatsoever upon this issue beyond the text of the document. Certainly, had the parties intended that the condemnation clause be general or that the United States be included, some evidence of the surrounding circumstances and the acts of the parties would have been available in support thereof. It is no answer that Lebenbaum did not adduce such proof. The burden was not on him to prove the non-existence of the forfeiture and *both* of the trial judges had ruled in his favor.

Summarizing, we do not dispute that a general condemnation clause may result in a forfeiture of a tenant's right to a condemnation award. We do not dispute that the term "other public body" may be used to include the United States or that it is a "public body." We do not dispute that the instant case involves an eminent domain proceeding for "a public purpose." We *do* assert that paragraph Ten is not a general condemnation clause but is a *limited* condemnation provision covering a particular kind of eminent domain proceedings only and that it, manifestly, was never intended to include the United States nor this type of a condemnation proceeding.

In the light of the text of this lease, the rules governing its construction, the evident inequity and injustice which

would follow a construction which would result in a forfeiture of Lebenbaum's rights, the fact that the construction given by Judges Hollzer and Weinberger is amply supported and is fair and just to all, we believe this Court should and will affirm their conclusions and judgment to the effect that the Lebenbaum lease remained in full force and effect during the Government's temporary occupancy. In fact, we believe the short answer to Gawzners' contentions is that on December 15, 1943, the United States was engaged in a bitter war with two supposedly powerful enemies and the taking of temporary occupancy of resort hotels on the Southern California coast for a Redistribution Station [R. 39] to rest and rehabilitate combat troops was uncontemplated and unknown, at least to the general public.

Before closing upon this point it is important to note that in the Notice of Termination [R. 305] Gawzners include two contentions in support of the alleged right to terminate the lease, both of which are without support in law, viz.:

A. That the Government's taking made it impossible for Gawzners to perform their covenant to keep Lebenbaum in quiet and peaceable possession [R. 309]. Such was not their covenant [Par. Thirty-one; R. 304]. Their covenant was against "let or hindrance on the part of the lessors or anyone claiming by or through them." As we have seen, the Government, through these proceedings, did not claim by or through the Gawzners—it carved a new

estate out of a portion of Lebenbaum's lease (*Duckett v. U. S.,* 266 U. S. 148, 151, 69 L. Ed. 216, 218). Such a taking in eminent domain *is not* a violation of the landlord's covenant of quiet and peaceable possession (*Gluck v. Baltimore,* 81 Md. 315, 324, 32 Atl. 515, 516). It was neither an eviction nor a release (*Gluck v. Baltimore,* 81 Md. 315, 324, 32 Atl. 515, 516).

B. That the Government's taking caused the consideration of the lease, to-wit, the possession of the premises, to fail without fault or act of Gawzners. This is not the law and, if Gawzners meant that thereby the condemnation worked a release of the lessee's obligation to pay rent, it is likewise contrary to law (*Pasadena v. Porter,* 201 Cal. 381, 387, 257 Pac. 526, 528; *Gluck v. Baltimore,* 81 Md. 315, 324, 32 Atl. 515, 516; *Leonard v. Auto Car Sales & Service Co.,* 392 Ill. 182, 195, 64 N. E. 2d 477, 483).

It is clear, therefore, that the trial court erred in not awarding to Lebenbaum the market rental value of the temporary occupancy together with the present value of his obligation to Gawzners for rent payable during such temporary occupancy. In this case, as we shall next show under Point II, that sum would represent the balance then on deposit in the registry less the apportionment to be paid to the Gawzners as the market rental value of the unleased area.

2. The trial court should have *followed through* and awarded the total compensation for the rental of the leased area to Lebenbaum.

a) Because he, alone, is the one from whom possession was taken.

It should be first noted that the lease is a conveyance of an estate in real property (*Pasadena v. Porter,* 201 Cal. 381, 386, 257 Pac. 526, 528).

> "It has a dual character. It presents the aspect of a contract, and also that of a conveyance. Consequently a lease has *two sets* of rights and obligations —those growing out of the relation of landlord and tenant and said to be based on privity of estate and those growing out of the express stipulation said to be based on privity of contract."
>
> 15 Cal. Jur., "Landlord and Tenant," §19, pp. 614-615.

> "Immediately upon the commencement of the term a tenant succeeds to all the rights of the landlord that are annexed to the estate, so far as the possession and enjoyment of the premises are concerned."
>
> 15 Cal. Jur., "Landlord and Tenant," §76, p. 667;
>
> *Walther v. Sierra Ry. Co.,* 141 Cal. 288, 290-291, 74 Pac. 840, 841.

> "The situation here is one in which the sovereign exercising the power of eminent domain, is substituting itself in relation to an estate or tenancy for years in place of the lessee, but only as to a portion of such lessee's ownership thereof."
>
> *U. S. v. 21 Acres of Land,* 61 Fed. Supp. 268, 273.

b) Gawzners had no right to possession and none could be taken from them.

> 32 Am. Jur., "Landlord and Tenant," § 76, pp. 89-90; §195, p. 185.

The only rights belonging to the landlords (the Gawzners) during the existence of the lease, as to the leased area taken by the Government, were:

1. Their reversion, *i. e.,* their right to convey or encumber the fee subject to the lease (which was not taken).

"It is clear that the Government has not acquired any part of the fee and that plaintiff's (lessor's) reversionary interest in the fee has not been affected by the proceeding." (Insertion for clarification.)

Leonard v. Auto Car Sales & Serv. Co., 325 Ill. App. 375, 381, 60 N. E. 2d 457, 460.

2. Their right to collect rental *from the lessee* (which was not taken or frustrated).

"A contract may be frustrated, but a demise is more than a contract. It is a conveyance of an estate in land or a chattel real * * *."

Leonard v. Auto Car Sales & Serv. Co., 325 Ill. App. 375, 387, 60 N. E. 2d 457, 462.

"When it is remembered that every lease possesses a dual aspect, being both a conveyance and a contract, a ready explanation may be found for the view that a lessee may cease to be entitled to the possession and yet remain bound by his contractual obligation to pay rent. * * * The appropriation of its (the lessee's) temporary use by the United States merely carved out of the appellant's (lessee's) long term lease a short term occupancy (*United States v. General Motors,* 323 U. S. 373, 382, 89 L. ed. 311, 320) and destroyed neither the property nor appellant's (the lessee's) leasehold estate therein * * *. That appellant

(lessee) is entitled to receive from the Government full compensation for so much of its leasehold estate as is appropriated to public use and thereby obtain complete indemnity for its loss is not open to question." (Insertion for clarification.)

Leonard v. Auto Car Sales & Serv. Co., 392 Ill. 182, 189, 64 N. E. 2d 477, 480-481.

"Being entitled to just compensation, there is no injustice in holding the defendant (lessee) liable to pay the rent, even though it cannot actually occupy the leased premises." (Insertion for clarification.)

Leonard v. Auto Car Sales & Serv. Co., 325 Ill. App. 375, 391, 60 N. E. 2d 457, 464.

But not, as we will show, from a condemnor who does not take the fee and does not take *all* of the lessee's term but merely takes a portion thereof. Of course, here, the Government did not take any portion of Gawzners' reversion [R. 54] and did not take their right to collect the contract rent from Lebenbaum [R. 54; C. 2; R. 234-235]. The Government did not take *under* the Gawzners, it carved a new leasehold estate out of Lebenbaum's leasehold estate (*Duckett v. U. S.,* 266 U. S. 148, 151, 69 L. Ed. 216, 218). But its position is somewhat in the analogy of a *subtenant,* as if it were:

"* * * a lease by the long term tenant (*i. e.,* Lebenbaum) to the temporary occupant (*i. e.,* the Government) * * *."

United States v. General Motors, 323 U. S. 373, 382, 89 L. Ed. 311, 320.

c) Gawzners had no right in or lien upon the portion of the Government's obligation which arose out of the taking of temporary occupancy of Lebenbaum's longer leasehold estate.

Compensation in eminent domain proceedings—

"* * * is the value of the interest taken. Only in the sense that he is to receive such value is it true that the owner must be put in as good a position pecuniarily as if his property had not been taken."

United States v. General Motors, 323 U. S. 373, 379, 89 L. Ed. 311, 319.

Hence, unless Gawzners had a right in the use or occupancy of Lebenbaum's term, or a lien thereon to secure Lebenbaum's obligation to them for rent, there was no interest *in such leasehold* taken from Gawzners and they would have no right to the compensation for such taking.

The lease [R. 275] does not give Gawzners any right to use or occupancy of the premises during the term. In fact, paragraph Two [R. 281] specifically states that the premises are let to and they shall be used by the lessee. We shall treat of eviction in a later portion hereof. Said lease does not give the lessors a lien to secure the payment of rent. In the absence of such express provisions, as we have already shown, the use and occupancy of the premises during Lebenbaum's term belonged to him and Gawzners had no right therein. Under California law there is no privity of estate or contract between a lessor and a *sublessee* if we assume that the Government, in effect, sustained such relation (*Erickson v. Rhee,* 181 Cal. 562,

567, 185 Pac. 847, 849; *Webb v. Jones,* 88 Cal. App. 20, 28, 263 Pac. 538, 542). Also in California, in the absence of an express provision therefor in the lease, a landlord has no lien upon the leasehold estate of the lessee or upon the income therefrom to secure payment of rents contracted to be paid or for the value of the use and occupancy of the property (15 Cal. Jur., "Landlord and Tenant," §137, p. 726; *Gruber v. Pacific States Sav. & Loan Co.,* 13 Cal. 2d 144, 148, 88 P. 2d 137, 139; *Hitchcock v. Hassett,* 71 Cal. 331, 333, 12 Pac. 228, 229).

> "The landlord is not entitled to compensation for damages to the property of the tenant and if the lessee's interest only is injured the lessor is entitled to no part of the compensation."
>
> 29 C. J. S., "Eminent Domain," §198, p. 1106.

d) The fund then remaining in the registry of the Court was the agreed monetary value of the Government's obligation for rental for the leased area and for the unleased area.

We will elaborate upon this phase under the second point of our argument.

What, then, is the measure of damage to which Lebenbaum was entitled where only a part of his leasehold estate was taken, his term continued and his contract obligation for rent continued?

> "The Government (substituted) itself as occupant of the demised premises in place of the owner of the right of such occupancy. The owner of such right

being the lessee, it is the latter who 'must be put in as good a position pecuniarily as if his property had not been taken,' and this is to be done by paying to him the value of the interest taken." (Insertion for clarification.)

United States v. 21 Acres of Land, 61 Fed. Supp. 268, 272.

"As * * * the lease has not been terminated, defendant (lessee) is guaranteed the right to recover the reasonable value of that portion of its leasehold estate which has been appropriated by the Government in the pending condemnation proceedings in the federal court. Plaintiff (lessor) will *have no claim* for the reasonable value of the use of the premises *against the Government,* since the Government will not have appropriated any interest of plaintiff's in the premises * * *." (Emphasis supplied.)

Leonard v. Auto Car Sales & Serv. Co., 325 Ill. App. 375, 391, 50 N. E. 2d 457, 464.

Under such circumstances, therefore:

"If the covenant to pay rent is not affected by the proceeding and judgment of condemnation, it is clear that * * * the lessee continuing personally liable but losing his estate, and right to its enjoyment, would be entitled to receive not merely the value of the term, but also a sum of money equivalent to the present value of the sum of the rents payable *in futuro.* That is, he should receive the value of his term subject to the rent, *and* such further sums as

would be considered a present equivalent for the rent thereafter to be paid * * *." (Emphasis supplied.)

Pasadena v. Porter, 201 Cal. 381, 387, 257 Pac. 526, 528.

Cf. Gluck v. Baltimore, 81 Md. 315, 325, 32 Atl. 515, 517.

"The obligation of the appellant (lessee) to pay rent * * * is of decisive importance in determining the amount of damages due the appellant (lessee) * * *. If, after a condemnation, a lessee *remains under obligation to pay rent,* it is entitled to damages equal to the fair rental value of the leased premises * * *." (Insertions for clarification; emphasis supplied.)

John Hancock Mut. Life Ins. Co. v. U. S., 155 F. 2d 977, 978.

This expresses the true rule and exemplifies why the Court erred in not awarding the value of the leasehold and the value of the rents *in futuro,* to Lebenbaum. The Court had concluded that the lease was not cancelled or terminated by the condemnation proceeding [C. 2; R. 234-235] and had found that Lebenbaum had performed his obligations under the lease [F. 12; R. 226] and that he had not paid rent because the lessors had refused to accept rent during the period of the Government's occupancy [F. 13; R. 226]. As we have seen, under such circumstances the law would keep Lebenbaum's obligations to Gawzners in full force and effect and he was not released from his rental obligation.

II.

The Trial Court Erred in Not Finding and Decreeing That the Parties Had Abandoned the Measure of Damages Fixed by the Fifth Amendment and Had Permanently Fixed the Sum of $113,704 Then Remaining in the Registry as the Agreed Rental to be Paid by the Government for the Compensation, Other Than for Restoration, for Its Taking of the Leased and Unleased Areas.

This is a restatement of Lebenbaum's Point 3 [R. 274]. By Stipulation [R. 45] approved by the Court and incorporated into a Judgment [R. 53], the appellants agreed that all compensation to be paid by the Government was the sum of $205,000, plus certain improvements which the Government had made and would relinquish to the fee owners; that such sum and relinquished property was "fair, just and adequate compensation" [R. 47, 55] for the Government's obligation for *rent* and for *restoration* and that such would be the testimony of competent witnesses [R. 49]. Such stipulation and judgment covered both the leased and unleased areas and did not segregate the award as between them.

By subsequent stipulation [R. 98] approved by the trial court and incorporated into an Order [R. 103], the *restoration* portion of the Government's obligation was fixed at $91,296 and such sum was distributed between the appellants in accordance with their stipulation and there was left in the registry, at the date of the judgment appealed from, the sum of $113,704 [F. 21; R. 231].

Appellant, Lebenbaum, contends:

a) The parties had the right to fix compensation by agreement and where there is such a contract these cases hold that neither party can offer contrary evidence.

Danforth v. United States, 308 U. S. 271, 282-283, 84 L. Ed. 240, 245;

Wachovia Bank v. United States, 98 F. 2d 609, 611, 612.

b) When so fixed it became binding in lieu of and supplanted the measure fixed by the Fifth Amendment.

"But the method used by the courts to determine 'just compensation' in an adversary proceeding where parties have failed previously to agree on its amount is not the exclusive method of determining that question. The Fifth Amendment does not prohibit land owners and the Government from agreeing among themselves as to what is just compensation for property taken. Nor does it bar them from embodying that agreement in a contract as was done here. * * * Since (they) have chosen to stand on their contract terms as to the amount they will receive for their property, rather than to have 'just compensation,' in the constitutional sense, fixed by the courts we must look to those terms for the measure of their compensation."

Albrecht v. United States, 329 U. S. 599, 603, 91 L. Ed. 532, 538.

"The right to just compensation for property taken and the right to an award for an amount expressly agreed upon, are *inconsistent* rights. The former rests upon equitable principles and comprehends that the owners shall be put in as good a position pecuniarily as he would have been if his property had not been taken. The latter rests upon express agreement *regardless of whether the owner's position pecuniarily is worse or better than if he had not parted with his property.*" (Emphasis supplied.)

U. S. v. 3.25 Acres of Land, 53 Fed. Supp. 884, 885-886.

c) Rental and restoration constituted full liability of the Government.

U. S. v. Land in Mariposa County, Calif., 77 Fed. Supp. 798, 800.

d) It necessarily follows then that when restoration was fixed and paid by agreement, the remaining sum of $113,704 represented *agreed rental* for the leased and unleased areas.

III.

The Trial Court Erred in Failing to Separately Find and Decree the Sum Due Appellants Gawzner for the Government's Obligation to Them for the Rental of the Unleased Area.

We believe that it is sufficient to refer to our Summary of this Argument, *supra*, page 14. Authorities previously cited under Points I and II support each and every statement therein made and the conclusion logically follows that if the $113,704 remaining in the registry represented the agreed rental compensation for the leased and unleased areas, it became necessary for the trial court to fix both and to deduct the amount to be disbursed to Gawzners as agreed rental for the unleased area from the total sum of $113,704 and order the balance disbursed to Lebenbaum. There were, of course, several methods by which this could have been done but the simplest one was to fix the rental value of the unleased area and deduct such amount from the total in which case the remainder would be the agreed rental for the leased area. The record discloses that the Court failed to do either [R. 214-236, 237-239]. Instead, the trial court assumed a purported jurisdiction in equity and further purported to fix the rights and obligations as between the Gawzners and Lebenbaum under the contract provisions of the lease (*i. e.,* the probable percentage rental which Lebenbaum would be required to pay to the Gawzners during the term of the Government's occupancy) and then, instead of awarding such amounts to Lebenbaum, the Court purported to make

an equitable distribution under which it attempted to pay Gawzners such prospective rental by distribution out of the remaining portion of the agreed award against the Government. This, as we shall note under Points V and VI, was contrary to the law and beyond the jurisdiction of the Court.

IV.

The Court Erred in Denying Lebenbaum's Motion to Exclude Appellants Gawzner From Participation in the Trial Except as to the Fixing of the Value of the Use and Occupancy of the Unleased Area. [R. 6, 16; 262, par. 9.]

The Court determined that the lease was still effective [R. 16]. This, by operation of law, eliminated any right of Gawzners in the compensation for the use and occupancy of the leased area.

As we have already seen, Gawzners were not entitled to share in any part of the rental compensation to be paid by the Government for the taking of a portion of Lebenbaum's leasehold interest:

> "The landlord is not entitled to compensation for damages to the property of a tenant, and *if the lessee's interest only is injured* the lessor is entitled to no part of the compensation." (Emphasis added.)
>
> 29 C. J. S., title, "Eminent Domain," Sec. 198, page 1106.

> "* * * (lessors) will have no claim for the reasonable value of the use of the premises *against the Government* since the Government will not have ap-

propriated any interest of the (lessors) in the premises." (Emphasis supplied; insert made for clarification.)

Leonard v. Auto Car Sales & Serv. Co., 325 Ill. App. 375, 391, 60 N. E. 2d 457, 464.

In this instance all obligations of the Government for restoration and repair had been completely paid and satisfied before the judgment appealed from was entered [R. 103, 237]. But even had such not been the case, the landlords (Gawzners) still had no right to participate in the award in so far as restoration and repairs were concerned since the covenants in the lease were still operative and enforceable.

"It (the lessor) had no interest in the money awarded to the defendants (the lessees), but only an ultimate property in the building which should be upon the premises when the defendants (lessees) surrendered it. If that building was kept in the condition in which the (lessees) agreed to keep it, it would have been a matter of no interest to the plaintiff (lessor) if the award made to the (lessees) was not large enough to cover the expenses of the repairs and reconstruction; and so, if the award was more than sufficient, that was of no interest to the (lessors). The award to the (lessees) belonged to them because it was an amount found by the Commissioners as a sum which would enable them to pay the cost of the repairs to the building. It may have been too much, but if it was, it was no affair of the (lessor). If at the close of the lease it (lessor) got what the (lessees) contracted to give it, it had all it was entitled to. * * *." (Insertions for clarification.)

Fargo v. Browning, 61 N. Y. Supp. 301, 303.

It is, of course, elementary that the only persons entitled to be *heard* in an eminent domain proceeding are those having some interest which has been taken.

> "The Government's liability for compensation to be awarded herein is limited by the statutes authorizing the proceeding * * *. Since appellant's rights were not condemned, no compensation can be awarded in this proceeding and consequently its Notice of Appearance and claim were properly stricken."
>
> *N. Y. Telephone Co. v. U. S.* (C. C. A. 2), 136 F. 2d 87, 88.

> "In such a controversy (as an eminent domain proceeding) third persons not interested in the land in subordination to or in common with the person whose right was sought to be taken, but claiming adversely, have no right to intervene * * *."
>
> "Section 1247, C. C. P. provides that in such (eminent domain) actions the court shall have power to hear and determine all adverse or conflicting claims to the property sought to be condemned. It is obvious from this language that these provisions do not contemplate or authorize the admission of a person as a party who does not show that he has some interest in or right to the property sought to be condemned, *or of a person whose statement of his right shows that he has no such interest.*" (Emphasis supplied; insert for clarification.)
>
> *San Joaquin, etc. v. Stevinson,* 164 Cal. 221, 236-237, 240, 128 Pac. 924, 930.

The Court should have restricted Gawzners' participation to the fixing of the compensation to be paid by the Government for the unleased area.

V.

The Court Erred in Refusing to Find and Decree That Its Jurisdiction Was Limited to Determining.

a) what interest the plaintiff had taken;

b) from whom they were taken;

c) what the appellants had fixed and agreed to be the compensation for such taking, after they had deducted and received their fixed and agreed compensation for restoration;

d) who was entitled to such compensation [R. 274].

VI.

The Court Erred in Refusing to Find and Decree That It Was Without Jurisdiction to Try and Determine the Contract Rights of Appellants Gawzner, Against Appellant Lebenbaum, to Collect Rents Under the Lease During the Plaintiff's Occupancy of the Leased Premises, or to Enforce Payment Thereof. [R. 274.]

In order to reduce the size of the transcript of the record, counsel for the respective appellants entered into an "agreed statement as to the record of *testimony*" [R. 342] by which they eliminated practically all of the arguments made by counsel including those made in support of objections and motions to strike. In this instance it appears that there was omitted substantially all of the objections made by counsel for Lebenbaum in support of his objections to the Court proceeding as it did. However, the Reporter's Transcripts were sent up as a part of the record by the Clerk of the District Court and we have quoted in Appendix iii the portions of said counsel's argument upon such issues.

The error of the Court is demonstrated by the following established principles:

a) This is a special proceeding in the nature of an action at law.

"We do not doubt that a proceeding for an assessment of damages for the taking of private property for public use is one at law."

Cherokee Nation v. Southern Kans. R. R. Co., 135 U. S. 641, 651, 34 L. Ed. 295, 300.

b) It is not an equity case.

"It possesses none of the essential elements of a suit in equity within the meaning of the statutes defining the jurisdiction of the courts of the United States."

Cherokee Nation v. Southern Kans. R. R. Co., 135 U. S. 641, 651, 34 L. Ed. 295, 300.

"The action (in eminent domain) was not a suit in equity to determine the title to the water, generally, or one *in which a general adjudication of such title could be made.* It was a special proceeding for a particular purpose—namely, to condemn the Stevinson right for the benefit of the plaintiff as the purveyor of the public use."

San Joaquin v. Stevinson, 164 Cal. 221, 236-237, 128 Pac. 924, 930;

Pasadena v. Porter, 201 Cal. 381, 388, 257 Pac. 526, 529.

c) It is not a proceeding *in personam.*

Monongahela Nav. Co. v. U. S., 148 U. S. 312, 326, 37 L. Ed. 463, 468.

d) But is a proceeding *in rem.*

"A condemnation proceeding is an action *in rem.* It is not the taking of rights of designated persons, but the *taking of the property itself.*" (Emphasis by the Court.)

Eagle Lake Imp. Co. v. U. S., 160 F. 2d 182, 184.

e) The fund remaining on deposit represented the rental for the rights taken and was *all* that was left for distribution and the full measure of the Court's jurisdiction.

"When property is condemned, the amount paid for it stands in the place of the property and represents all interests in the property acquired. *U. S. v. Dunnington,* 146 U. S. 338, 350, 353; 36 L. ed. 996."

Eagle Lake Imp. Co. v. U. S., 160 F. 2d 182, 184;

San Joaquin etc. v. Stevinson, 164 Cal. 221, 236-237, 128 Pac. 924, 930;

Pasadena v. Porter, 201 Cal. 381, 388, 389, 257 Pac. 526, 529.

It was *all* that was left for distribution because it was the *agreed balance* and as such was not subject to be measured by the obligations under the Fifth Amendment (*Albrecht v. United States,* 329 U. S. 599, 603, 91 L. Ed. 532, 538; *United States v. 3.25 Acres of Land,* 53 Fed. Supp. 884, 885-886). It was the full measure of the Court's jurisdiction because that jurisdiction was limited to the adjustment of the remedies of the landlord and tenant *against* the condemnor.

"The court sitting (in an eminent domain proceeding) has no equitable jurisdiction, and accordingly has no power to reform or revise the lease in question, nor to determine to what extent the covenant to pay

rent shall be affected, if at all * * *. The landlord and tenant are confined to their remedies against the (condemnor) * * *"

Pasadena v. Porter, 201 Cal. 381, 388, 389, 257 Pac. 526, 529.

f) This was the agreed rental value in lieu of the constitutional market rental value.

Albrecht v. United States, 329 U. S. 599, 603, 91 L. Ed. 532, 538.

g) The only jurisdiction which had been invoked was under the eminent domain statute.

N. Y. Telephone Co. v. U. S., 136 F. 2d 87, 88;

Pasadena v. Porter, 201 Cal. 381, 388, 389, 257 Pac. 526, 529;

San Joaquin etc. v. Stevinson, 164 Cal. 221, 236-237, 128 Pac. 924, 930.

h) The appellants (defendants) and the trial court were limited as to the remedies and jurisdiction to the remedies which the appellants had against the Government as condemnor.

"The action was not * * * one in which a general adjudication of * * * title could be made."

San Joaquin, etc. v. Stevinson, 164 Cal. 221, 236, 128 Pac. 924, 930.

"In this proceeding the landlord and tenant are confined to their remedies against the (condemnor)."

Pasadena v. Porter, 201 Cal. 381, 389, 257 Pac. 526, 529.

i) There was no federal jurisdiction here invoked and available to the Court and the appellants as to the matters not affecting appellants' rights against the Government as condemnor, such as controversies *in personam inter se* because there was no diversity of citizenship.

In this connection it is to be noted that the trial court apparently forgot that there was no Declaration of Taking [R. 185]; Title 40, Section 258a, U. S. C. does invest a federal trial court with jurisdiction to exercise equitable jurisdiction in eminent domain proceedings in effecting disbursement of the award *in cases in which the Declaration of Taking has been filed* (*Swanson v. U. S.*, 156 F. 2d 442, 447). But no such right exists in the *absence* of such Declaration of Taking, such as existed in this case. Furthermore, even if there had been a Declaration of Taking, such equitable jurisdiction would not include the right to determine *rights in personam* which did not vest an interest, estate or lien in or upon the right taken or the fund which represented it (*U. S. v. Certain Land in Annapolis, Md.*, 46 Fed. Supp. 441, 447).

We appreciate that the record shows extreme patience and sincerity on the part of the trial judge and that his every action and ruling was intended to safeguard and protect his conception of the equitable rights of all. We have no doubt that he may have considered a possible loss by Gawzners if they were not paid their rent out of the award, although the entire evidence in the cause gave no indication of such a purpose on the part of Lebenbaum,

or that such an event was other than the remotest possibility. As we have seen, the Court expressly found that Lebenbaum had fully complied with the terms, provisions and covenants of the lease [F. 12; R. 226] and even the notice by Gawzners made no claim of default on his part [R. 305]. Such a remote hypothesis has been considered and rejected by the Supreme Court of California.

> "* * * 'if a case should arise where, upon the payment of the value of the leasehold interest to the tenant, the remedy of the landlord to collect his rent might be impaired or defeated on account of the insolvency of the tenant, or other cause, a court of equity might interpose to prevent the payment of the damages recovered into the hands of the tenant, and appropriate the fund, or so much thereof as might be necessary, to the payment of the rents due or to become due from the tenant to the landlord during such time as the lease might, by its terms, continue to run.' We express no opinion as to the question whether or not such a proceeding would lie *in an independent action between appellant and respondent,* but see no room for its invocation in the present situation of the parties. *In this proceeding the landlord and the tenant are confined to their remedies against the condemning municipality.*
>
> "It has been argued here that, if the respondent be allowed to recover for the full value of the leasehold interest, there will be handed over to the tenant a portion of the damages which is the equivalent of the rent to be paid, and appellant may lose her rent by the insolvency of the respondent, or otherwise. The

same contention was advanced in *Gluck v. Baltimore, supra,* and the court said: 'It has, however, been contended that, if the tenant should be allowed to recover for the full value of the leasehold interest, and the landlord should be required to rely upon the personal obligation of the tenant for the payment of rent, a rule of this character would or might in many instances result in great loss to the landlord. At best, this is a mere suggestion of a possible hardship * * * Obviously a principle, if sound, ought to be applied wherever it logically leads, without reference to ulterior results. That it may, in consequence, operate in some instances with apparent, or even with real harshness and severity, does not indicate that it is inherently erroneous. Its consequence in special cases can never impeach its accuracy.' "

Pasadena v. Porter, 201 Cal. 381, 388, 389, 257 Pac. 526, 529.

VII.

If the Court Had Jurisdiction to Determine and Enforce Payment of the Rental Due From Lebenbaum to Gawzners Under the Lease, During the Period of Plaintiff's Occupancy of the Leased Premises, It Should Have Found and Decreed That Such Rental Was the Minimum Guarantee of $1500 Per Month as Provided in Paragraph Three of the Lease [R. 275].

This point is completely treated in our Summary of the Argument, *supra,* page 20.

VIII.

The Court Erred in Overruling Lebenbaum's Objections to, and Denying His Motions to Strike the Answers of the Witnesses Allen and Frisbie as to the Bonus Value of Lebenbaum's Leasehold Estate.

In view of the fact that the appellants, by stipulation, had fixed the compensation in an agreed amount as the agreed award for rental of the leased and unleased areas, the question as to what might or might not have been the bonus value measure under the Fifth Amendment, was irrelevant. Also, the bonus value rule only applies where the entire leasehold is taken and the lease is thereby terminated, or where a portion of the leasehold is taken but the lessee's obligation for rent is terminated.

U. S. v. General Motors Corp., 323 U. S. 373, 382, 89 L. Ed. 311, 320;

U. S. v. Petty Motor Co., 327 U. S. 372, 378, 381, 90 L. Ed. 729, 734, 736;

John Hancock Mut. Life Ins. Co. v. U. S., 155 F. 2d 977, 978.

Appellant Lebenbaum, therefore, respectfully represents that this Honorable Court should remand the cause to the trial court with directions:

1. To find that the parties by agreement have fixed the rental compensation for the leased and unleased areas, in the sum of $113,704;
2. To find that such sum by agreement, represents 77.7% of the market rental value of said leased and unleased areas;

3. To find that the agreed reduced rental value of the unleased area is the sum of $8,508.00 and that the agreed reduced rental value of the leased area is the sum of $105,196.00;

4. To conclude that judgment should be rendered awarding the sum of $19,403.98 to Gawzners and the sum of $91,023.77[1] to Lebenbaum, and to enter judgment accordingly.

Respectfully submitted,

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PAUL R. COTÉ,
By IRL D. BRETT,
Attorneys for Appellant Leo Lebenbaum.

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[1]While the awards would normally be: Gawzners, $8508.00 and Lebenbaum, $105,196.00, the Government was entitled to a credit for $1594.02 which had been paid to Gawzners [R. 264, par. 14] which would reduce their award to $6903.98, then Lebenbaum had assigned $12,500.00 of his award to Gawzners as security for his liquor license [R. 60] which would increase Gawzner's award to $19,403.98. The Government had exercised an offset of $1672.23 against Lebenbaum [R. 265, par. 20]; this reduced his award to $103,523.77. His assignment of $12,500.00 as security for the liquor license [R. 60] reduces his award to $91,023.77.

APPENDIX I.

Fifth Amendment: "Nor shall private property be taken for public use without just compensation."

First War Powers Act—Act approved August 18, 1890; 26 Stat. 316 (50 U. S. C. 171):

"The Secretary of War may cause proceedings to be instituted in the name of the United States, in any court having jurisdiction of such proceedings for the acquirement by condemnation of any land, temporary use thereof, or other interest therein, or right pertaining thereto, needed for the * * * location * * * of * * * military training camps * * * such proceedings to be prosecuted in accordance with the laws relating to suits for condemnation of property of the States wherein the proceedings may be instituted * * *."

Second War Powers Act—Act approved March 27, 1942:

"Sec. 2. The Secretary of War, the Secretary of the Navy, or any other officer, board, commission, or governmental corporation authorized by the President, may acquire by purchase, donation, or other means of transfer, or may cause proceedings to be instituted in any court having jurisdiction of such proceedings, to acquire by condemnation, any real property, temporary use thereof, or other interest therein, together with any personal property located thereon or used therewith, that shall be deemed necessary, for military, naval, or other war purposes, such

proceedings to be in accordance with the Act of August 1, 1888 (25 Stat. 357), or any other applicable Federal statute, and may dispose of such property or interest therein by sale, lease, or otherwise, in accordance with section 1 (b) of the Act of July 2, 1940 (54 Stat. 712). Upon or after the filing of the condemnation petition, immediate possession may be taken and the property may be occupied, used, and improved for the purposes of this Act, notwithstanding any other law. Property acquired by purchase, donation, or other means of transfer may be occupied, used, and improved, for the purposes of this section prior to the approval of title by the Attorney General as required by section 355 of the Revised Statutes, as amended."

APPENDIX II.

The following Street Improvement Acts, each of which authorized condemnation proceedings to acquire the necessary rights-of-way and other lands and each of which provided for creation of assessment districts and assessing the cost of the improvements against the lands benefited by the improvement were effective on December 15, 1943:

Street Opening Act of 1889 (Streets and Highways Code Sections 3200-3351);

Assessments: Chapter 4 (Sections 3260-3267), Chapter 5 (Sections 3280-3290);

Condemnation: (Sections 3330-3335).

Street Opening Act of 1903 (Streets and Highways Code Sections 4000-4443);

Assessments: Sections 4270-4350;

Condemnation: Sections 4185-4241.

The Improvement Act of 1911 (Streets and Highways Code Sections 5000-6794);

Condemnation: Sections 6120-6123;

Assessments: Sections 5315-5327.

Typical examples of the provisions are the following sections from the Street Opening Act of 1903 (the Act involved in Pasadena v. Porter):

Streets & Highways Code Section 4270:

"*Diagram of project: Preparation and delivery: Data required to be shown.* Upon the entry of the interlocutory judgment, the legislative body shall order the engineer to make and deliver to the street superintendent a diagram of the improvement and of the property within the assessment district described in the ordinance of intention. The

diagram shall show the land to be taken for the proposed improvement, and also each separate lot or parcel of land within the assessment district, and the dimensions of each such lot or parcel of land, and its relative location to the proposed improvement."

Streets & Highways Code Section 4271:

"*Assessment of expenses: Deduction of contribution.* If the proceeding is not conducted by a county, the engineer shall deliver the diagram to the street superintendent and shall indorse thereon the date of such delivery. The street superintendent upon receiving the diagram (or, if the proceeding is conducted by a county, the county surveyor or other engineer upon the completion of the diagram) shall proceed to assess the total expense of the proposed improvement against the lands, including the property of any railroad or street railroad, within the assessment district, except the land to be taken for the improvement, in proportion to the benefits to be derived from the improvement. Before the total expense is assessed he shall deduct such percentage or sum as the legislative body has declared by the ordinance of intention that the city shall pay."

Streets & Highways Code Section 4300:

"*Right to demand offset.* The owner of any property assessed, who is entitled to compensation under the award made by the interlocutory judgment, may, at any time after the assessment becomes payable, and before the sale of the property for nonpayment thereof, and before the issuance of bonds to represent the assessment, demand of the street superintendent that such assessment, or any number of assessments, be offset against the amount to which he is entitled under the interlocutory judgment."

APPENDIX III.

[Rep. Tr. p. 127]:

(Mr. Hearn.)

In this case we have, as I said before, the rulings of this court that the lease is still in effect. That being the case, we have this situation that Gawzner is still able now, and under the language of this term of this lease, will be able, to look to Lebenbaum for rent in full, and no matter what, if anything, this court may award Gawzner as compensation for what the government may have taken from him, that will not relieve Lebenbaum from the obligation to pay rent to Gawzner, and, if, by any judgment that is rendered in this court, any portion of the award paid by the government for rent is awarded to Gawzner, Lebenbaum will still be liable to Gawzner for rent. I can see no escape from that whatever since the question of rent as between Gawzner and Lebenbaum in this action is not before the court either by pleadings or as the result of the law as we have seen it to be. So that, if there is an award to Gawzner for rent in this case or for some compensation for the use and occupancy of these premises during the period the government was in there, that will still not relieve Lebenbaum. It will not be *res judicata* on the subject of rent as between these two contesting defendants, and Lebenbaum will still be liable. The law in such cases proceeds upon the assumption that the landlord is not injured by not giving him the money directly out of the award; that he has his remedy against the lessee personally, by a personal action, an action *in personam,* to [R. T. 128] recover the rent, which is no worse remedy than he had before the condemnation occurred. He is in no worse position and he still has identically the same remedies that he had before.

A second objection or ground that I have for the objection made is this. We are before your Honor to settle the question of the apportionment of this award as between these two contesting defendants, and I am treating Mr. and Mrs. Gawzner, of course, as being one defendant. It is true, without question, that Mr. Gawzner is entitled to recover the rental value of that portion of the condemned property which lies outside the boundaries of the Miramar Hotel. We don't dispute that. But what we say is that he is not entitled to any portion of the award for use and occupancy of the part included within the hotel because he has his remedy in a personal action against Lebenbaum. But, being before the court on the question of apportionment, we have this question, which reduces itself to one of simple arithmetic, it seems to me. I anticipate that the witness will answer that Mr. Lebenbaum's lease had no value over and above the rent, that is to say, that it had no bonus value. Let's assume for the purpose of our reasoning for a moment that that were true, which I do not admit. If it were true that the lease had no bonus value and if for that reason Lebenbaum were not entitled to any portion of the award for the use and occupancy during the period that the government occupied it, then it [R. T. 129] would not follow from that premise that Gawzner was entitled to it. So what would we do with the rest of the money that is here? The mere fact that one man is not entitled to the money doesn't, of itself, establish the fact that some other person is entitled to it. In a condemnation case, the only person who can recover anything is the one from whom something was taken. Now, what did the government take in this case? It took the temporary use and occupancy of the premises, the Miramar Hotel premises, for a period of time beginning after and ending before the period of Lebenbaum's

lease. From whom did it take the right of use and occupancy? It took it from the man who owned it. Who owned it? Under the law of landlord and tenant, Lebenbaum and Lebenbaum alone owned the right to use and occupy those premises. Mr. Gawzner had the right to go on the premises to inspect them and to inspect Mr. Lebenbaum's books and records, but he had no other right, other than as a member of the general public, to go on the premises. He had no right to participate in running that business, in taking any hand in its operation. He could be excluded from the premises by Lebenbaum if at any time he made himself obnoxious there and had gone beyond the rights that the lease gave him to inspect. So, when we come to decide how we are going to divide this award and we come to decide what was taken and from whom we would take that with respect to the Miramar Hotel, nothing was taken from [R. T. 130] Mr. Gawzner. He had nothing to give the government. But the right of use and occupancy was owned by Lebenbaum to the exclusion of the world, including Gawzner, and was from him only that the government took the temporary right of the use and occupancy and from him only that the government could take it.